DCB BANK BHD

v.

NS BAHTERA SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[CIVIL SUIT NO: D2-22-748-1996]
29 DECEMBER 1998

CIVIL PROCEDURE: *Summary judgment - Affidavit - Affidavit in reply to show cause affidavit - Whether plaintiff can file such affidavit as of right or whether leave of court necessary*

The defendant, pursuant to O. 14 r. 4(1) of the Rules of the High Court 1980, filed a show cause affidavit to resist the plaintiff's summary judgment application. Consequently, the plaintiff sought to file an affidavit in reply to the defendant's said show cause affidavit. The defendant contended that the plaintiff could only do so with leave of court and not as of right and thus appealed against the senior assistant registrar's decision that the plaintiff had the right to file an affidavit in reply.

Held:

[1] A person must have a right to reply to what is set up against him, unless the right is curtailed by statute or there is good reason for the court to curtail it on judicial considerations.

[2] In an application for summary judgment, the plaintiff is not required at the outset to show that there is no triable issue. He is only required to establish a *prima facie* case and to state his belief that there is no defence to his claim, upon which the burden then shifts to the defendant to show a triable issue.

[2a] The defendant may rely on an irrelevant fact to show a triable issue. The plaintiff must be given a right to demonstrate that it is irrelevant. The frequency of such cases does not justify the imposition of the requirement that the plaintiff must obtain leave to demonstrate to the court that the defendant's showing of cause or the issue raised by him as a triable issue is futile or is not a triable issue.

[2b] A plaintiff has a right of reply to the defendant's show cause affidavit in a summary judgment application.

[Appeal dismissed.]

Cases referred to:
Chong Yeo & Partners & Anor v. Guan Ming Hardware & Engineering Pte Ltd [1997] 2 SLR 729 ***(foll)***
Davis v. Spence [1876] 1 CPD 719 ***(refd)***
Girvin v. Grepe [1879] 13 Ch D 174 ***(refd)***
National Company for Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220 ***(aff)***
PB Securities Sdn Bhd v. Abdul Rashid Mohamed [1994] 3 CLJ 209 ***(not foll)***
Rotheram v. Priest [1879] 41 LT 558 ***(cit)***

Legislation referred to:
Rules of the High Court 1980, O. 14 r. 4(1)

Other source referred to:
Atkin's Encyclopaedia of Court Forms In Civil Proceedings, 2nd edn, vol 29

For the plaintiff - T Sudharsanan; M/s Shook Lin & Bok
For the defendants - MS Nayagam; M/s Ahmad Rostam & Nayagam

Reported by S Dharmendran

JUDGMENT

Abdul Aziz Mohamad J:

The question to be decided in the appeal by the defendants was whether, in an application for summary judgment under O. 14, the plaintiff has a right to file an affidavit in reply to the defendant's show-cause affidavit. The learned senior assistant registrar had decided that the plaintiff in this case had the right.

Before me, learned counsel for the defendants took the position that a plaintiff could file an affidavit in reply only with leave of the court. Learned counsel for the plaintiffs maintained that a plaintiff could do so as of right, without leave.

Order 14 r. 4(1) provides that a defendant may show cause against an application for summary judgment by affidavit or otherwise. The provision is intended to lay down the principle as to the manner in which a defendant may resist summary judgment. It is not intended to deal with the question of a right to reply and ought not to be used as a basis for arguing that there is no right to reply. In principle, a person must have a right to reply to what is set up against him, unless the right is curtailed by statute or there is good reason for the courts to curtail it on judicial considerations.

The authority cited by learned counsel for the defendants for the proposition that leave is required to file a reply is *PB Securities Sdn. Bhd. v. Abdul Rashid bin Mohamed* [1994] 3 CLJ 209 where, at p. 212, Richard Talalla J said that leave is required. He based his opinion on the English cases of *Davis*

v. Spence [1876] 1 CPD 719, *Girvin v. Grepe* [1879] 13 Ch. D 174, and *Rotheram v. Priest* [1879] 41 LT 558. Those were decisions on the exercise of the discretion as to whether to admit the plaintiff's affidavit in reply. It would appear that in England the affidavit in reply of a plaintiff is not a matter of right. But certain statements from those cases are statements from which it could be argued that the plaintiff has the right of reply or should have it. In *Davis v. Spence,* Brett J said: "The obligation on the defendant to show cause by necessary implication allows the plaintiff to answer the defendant's case." In *Girvin v. Grepe,* Jessel MR said at p. 176: "It seems to me a most extraordinary thing that the judge is not to allow the plaintiff, so to say, to state his case and verify it. What difference can it make whether he does so by affidavit in reply or by one of a bundle of affidavits brought in in the first instance?"

Perhaps the reason why in England the plaintiff is not accorded the right to file an affidavit in reply is as stated at p. 234 of *Atkin's Encyclopaedia of Court Forms In Civil Proceedings*, 2nd edn, vol 29, cited by Richard Talalla J at p. 212 of his judgment. It is there stated: "There is no object or value in an affidavit in reply by the plaintiff which merely contradicts on oath the sworn statements of the defendant, for the case cannot be tried on the affidavits. Where the defendant is able to set up a triable issue, an affidavit in reply will usually merely have the effect of emphasising that there is an issue to be tried". Those statements seem to be based on the assumption that in the ordinary course of events a defendant's show-cause affidavit will either fail to show up a triable issue, in which case summary judgment will be granted, or will succeed in showing up the existence of a triable issue and there can be nothing more that the plaintiff can bring out to dispel the appearance of a triable issue, and that the instances in which the plaintiff would be able to do so would be exceptional instances, so that he must seek leave to attempt to do so. It does not seem to me that that is the situation that one actually finds existing in our jurisdiction. I do not think that the cases are exceptional where a plaintiff will be able to show that the triable issue that appears to be raised is a mere illusion or a sham. It happens quite frequently. It happens because the plaintiff, in an application for summary judgment, is not required to lay before the court everything that is known to him about the case. The plaintiff may know of a fact or circumstance that the defendant may use to argue that there is a triable issue but that the plaintiff can conclusively demonstrate to be irrelevant, but in applying for summary judgment the plaintiff is not required to anticipate everything that the defendant might raise and so clutter his application with facts and documents that may prove in the end to be irrelevant. He is not required at the outset to show that there is no triable issue. He is only required to establish a *prima facie* case and to state his belief that there is no defence to his claim, upon which

the burden then shifts to the defendant to show a triable issue. See *National Company for Foreign Trade v. Kayu Raya Sdn. Bhd.* [1984] 2 MLJ 300 at p. 302C left. The defendant might rely on the irrelevant fact or circumstance to show a triable issue. The plaintiff must be given a right to demonstrate that it is irrelevant. The frequency of such cases does not justify the imposition of the requirement that the plaintiff must obtain leave to demonstrate to the court that the defendant's showing of cause or the issue raised by him as a triable issue is futile or is not a triable issue. I agreed with learned counsel for the plaintiffs that the imposition of such a requirement would place a strain on the court system. I believe that in the majority of cases the plaintiff would want to seek leave. That will add another tier to the proceedings, another set of applications, in the hearing of which it will be difficult to avoid an overlapping of consideration, because in considering whether the plaintiff ought to be granted leave the court, to a large extent, would be virtually looking into the same questions and facts as it would be looking into when it comes to consider the summary-judgment application proper.

The facility of summary judgment afforded by the rules is a beneficial thing. It saves unnecessary loss of time and expense in going to trial where there is actually no defence. The defendant ought not to be accorded his common law right to appear in court and defend if it can be shown earlier that he does not have a defence. While it is important that a plaintiff should not abuse the facility, it is equally important that a defendant be not allowed to easily escape summary judgment and that therefore the plaintiff be given the right to show that the defendant's attempt to raise triable issues to escape summary judgment is a sham or is misconceived. I think it would be bad judicial policy to require the plaintiff to obtain leave before he could do that.

I conclude by mentioning the Singapore case of *Chong Yeo & Partners & Anor v. Guan Ming Hardware & Engineering Pte Ltd* [1997] 2 SLR 729 cited by learned counsel for the plaintiffs, where the Singapore Court of Appeal had occasion to remark upon the amended O. 14 applicable in Singapore. Order 14 r. 2(1) and (8) are as follows:

> (1) An application under Rule 1 must be made by summons supported by an affidavit or affidavits.
>
> ...
>
> (8) An affidavit or affidavits for the purpose of this Rule must contain all necessary evidence in support of or in opposition (as the case may be) to the claim, or a part of the claim, to which the application relates, and unless the court otherwise directs, may contain statements of information or belief with the sources and grounds thereof.

This is what the Court of Appeal said at p. 747, para 67:

> The amended rule envisages a three-stage process. First, the affidavit in support of the application is filed. Next, the defendant is supposed to come in. It is imperative at this stage that the necessary evidence have been put in to enable the defence to know what it is up against. Then the applicant has a right to reply.

I was of opinion that a plaintiff has a right of reply to the defendant's show-cause affidavit in a summary-judgment application, and I dismissed the appeal.